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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KAMARI JAMAAL NELSON, Defendant and Appellant.	H034344 (Santa Clara County Super. Ct. No. 211266)

I. INTRODUCTION

Defendant Kamari Jamaal Nelson was charged with 10 felony counts involving various forms of sexual assault and other crimes. As to the sex offenses, the defense theory was that defendant had reasonably believed his victims, who were prostitutes, had consented. The jury rejected the defense and convicted defendant on all 10 counts. He was sentenced to prison for an indeterminate term of 90 years to life plus a determinate term of 74 years and eight months.

On appeal, defendant challenges the admission of evidence of uncharged sexual offenses pursuant to Evidence Code section 1108, the use of CALCRIM No. 1191, and the trial court's refusal of a special instruction defining prostitution. Defendant also maintains that a term of 164 years in prison for what defendant describes as neglecting to pay prostitutes is cruel and unusual punishment. We reject each of these arguments.

We do find merit in two arguments related to defendant's sentence. First, we agree that the evidence was insufficient to support the finding that defendant's prior

conviction under Penal Code section 245, subdivision (a)(1)[1] was a serious felony within the meaning of section 667, subdivisions (a), and (b) through (i). We also agree, and the Attorney General concedes, that the trial court improperly sentenced defendant to full consecutive terms for two counts of assault to commit rape. (§ 220.) We shall reverse the judgment and remand to allow retrial of the prior conviction allegation and for resentencing.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Victim 1--September 1, 2006 through January 10, 2007

Victim 1 advertised escort services on Craigslist, an internet bulletin board used by persons with property or services for sale. Escort service is a euphemism for prostitution. Sometime between September 2006 and January 2007, defendant responded to victim 1's advertisement and requested an outcall, which is an arrangement by which the prostitute meets the client at a location chosen by the client. Defendant arranged to meet victim 1 at his apartment. When victim 1 arrived, she followed defendant into the bedroom where they sat on the bed. Defendant touched her arms, telling her how pretty she was. He opened her purse, which victim 1 had placed on the bed, and took her identification and a cell phone. Victim 1, who was 19 years old, was used to her clients asking for identification because she looked very young. Victim 1 asked defendant for her "donation" but defendant ignored her request. When she asked a second time, defendant got up and left the room. Victim 1 said, "It finally hit me this was not what I thought it was." He came back with a knife and held it in his raised fist while demanding that victim 1 take off all her clothes. He threatened to kill her family if she did not. Victim 1 complied.

Defendant began touching victim 1, playing with her body and touching her vagina, meanwhile holding the knife to her throat. Victim 1 was "terrified." Defendant

[1] Further unspecified section references are to the Penal Code.

asked her for money, which victim 1 claimed she did not have. He took pictures of her while she was undressed, ordering her into different poses. Victim 1 did not allow clients to photograph her and she would have refused to pose for defendant if he had not threatened her with a knife. He instructed her to suck his penis; the knife was next to him. He had her lie prone on the bed and attempted to have intercourse with her, using his fingers to try and insert his semi-erect penis into her vagina. He then turned her over and tried again to have intercourse but could only penetrate a "little bit." He then forced victim 1 into the shower where, while fondling her breast, he masturbated behind her. Victim 1 felt something warm on her back. Defendant then became nice again.

For the next two hours, victim 1 stayed in the apartment watching television. She was still "terrified" and did not feel like she could just get up and leave. Meanwhile, defendant sat at a computer, moving pictures of victim 1 from her Craigslist advertisement to another site. He told her he was going to make her "work the track" in Sacramento, which meant that he was planning to be her pimp and have her solicit customers for sex in Sacramento. Victim 1 did not want to do that. Thereafter, defendant took victim 1 to his car and drove toward the Alameda. Victim 1 did not run because she was afraid defendant would hurt her or her family. Defendant drove only a short way, about two exits, when victim 1 feigned the need for a restroom; she was just "trying to figure a way to get out of it." Defendant pulled off and stopped at a gas station. Victim 1 went into the restroom, took a second cell phone from her purse, and called her ex-boyfriend for help. About five minutes later there came a knock on the restroom door and a voice, a friend of her ex-boyfriend's, told her to come out. When victim 1 came out, defendant was gone.

Victim 1 did not call police because she was afraid defendant would hurt her family and because she was afraid she would get in trouble for prostitution. About a month later, victim 1 was still escorting. She got a call from someone with a voice she

thought she recognized. The caller requested an outcall at the apartment building where she had previously met defendant. Victim 1 did not go on the call.

B. Victim 2--December 21, 2006

Around midnight on December 20, 2006, victim 2 was arrested for being under the influence of methamphetamine and marijuana. As victim 2 was leaving the jail several hours later, defendant drove up and asked if she wanted a ride. Victim 2 declined but exchanged telephone numbers with defendant. The number she gave him was the one she used in advertising her escort services on Craigslist. Later that day, defendant called that number and asked victim 2 for an outcall. Victim 2 agreed and met defendant at a restaurant. Victim 2 described defendant as neat and clean and very young. She thought it was unusual that he would be paying for sex.

Victim 2 returned with defendant to his apartment and on the way they agreed upon a price for the sexual services she would perform. Because she had just checked out of the motel where she had been staying, victim 2 had all her belongings--clothes and a Toshiba laptop computer--with her. She left these possessions in defendant's car and went with him to his apartment. She took her cell phone and her money with her.

Once in the apartment, victim 2 chatted with defendant for a few minutes. Victim 2 received a call on her cell phone from a friend, another prostitute, who was checking on her welfare. Following the call, defendant changed from "Mr. Perfect and nice to Mr. Mean demon." He first locked all the doors, then he asked to see her phone and, "not thinking," she gave it to him. He told victim 2 she was not getting anything and, "[Y]ou're not leaving." Victim 2 told him, "maybe this was not a good idea." That is when he "started getting aggressive." He grabbed her by the throat with enough force that she could not breathe. Victim 2 tried to fight him off but defendant overpowered her.

Victim 2 had stashed money on her person--in her bra, in her pocket, some in her hair. Defendant began pulling at her clothes taking the money. He managed to get all of it. When victim 2 fought back defendant became even more aggressive. He slapped her,

put his arm around her throat and dragged her backwards into the bathroom where he continued trying to take her clothes off and began taking photographs of her. He pulled her into the bedroom where he put a gun to her head, and, threatening to shoot her, ordered her to take off her clothes. Victim 2 said "no"; she did not want him to do anything to her. She lied and claimed to be having her menstrual period. He then dragged her into the living room.

When defendant put the gun to her head, victim 2 had begun to cry. Defendant told her not to cry. He said, "Why are you crying, it could be worse, you could have had a train ran on you." As victim 2 understood it, defendant was referring to a situation where a person is forced against her will to perform sexual acts with more than one person. Victim 2 continued to cry, saying, "Why are you doing this, you don't have to. You're a good-looking man, why do you have to do this." Defendant put a condom on his penis, then grabbed the back of her head and forced her mouth onto his penis. Victim 2 continued to cry and gagged on the penis but defendant kept it there until he ejaculated. After he ejaculated, he was "back to normal, nice guy, let's go have lunch." She felt totally violated. This was the first time such a thing had happened to her on a pay date.

Victim 2 asked for the return of her cell phone but defendant refused. Victim 2 left the apartment with defendant, thinking he might let her go. But instead of going for "lunch," defendant told her that he was taking her to Fremont. Victim 2 started yelling, screaming, crying, and was ready to "tuck and roll," i.e., jump out of the car while it was moving, because she was afraid of what else defendant was going to do to her. Defendant became concerned she was "going to get [him] caught up," and so he drove to the back of an apartment building and let her out. He told her he would keep her possessions, including her laptop, for his "congregation." Victim 2 got out of the car and defendant drove off with her belongings in the back seat.

A man in the parking lot saw victim 2 crying and shaking, "very, very upset." He telephoned the police. Victim 2 was taken to the hospital where she told police officers

about the assault, initially leaving out the fact that she had entered into the encounter as a prostitute. A nurse examiner found small bruises on front center and left side of victim 2's neck, bruising on the roof of her mouth, and red veins in the whites of her eyes. All findings were consistent with victim 2's description of the assault.

C. The January 9, 2007 Incident

The assault upon victim 1 came to the attention of law enforcement in January 2007 after police interviewed one M. Doe, a prostitute. Following that interview, law enforcement officers searched defendant's apartment in San Jose and a vehicle registered to defendant's girlfriend. The searches uncovered several cell phones, a California identification card for victim 1, three cameras, computers, and a used condom. Officers contacted victim 1 about the identification card. When they asked her about it, she immediately began to cry. She was also visibly shaken when she was shown a photo lineup containing a picture of defendant. Other items recovered were victim 2's Toshiba laptop and her cell phone. No gun was found. Victim 2 identified defendant from a photo lineup.

D. Charges

Defendant was charged by indictment with 10 felonies:

Count 1, first degree robbery (§§ 211, 212.5, subd. (a)).

Count 2, aggravated oral copulation (§ 288a, subd. (c)(2)).

Count 3, assault with intent to commit rape (§ 220, subd. (a)).

Count 4, aggravated sexual penetration (§ 289, subd. (a)(1)).

Count 5, assault with intent to commit rape (§ 220, subd. (a)).

Count 6, aggravated sexual penetration (§ 289, subd. (a)(1)).

Count 7, kidnapping (§ 207, subd. (a)).

Count 8, first degree robbery (§§ 211, 212.5, subd. (a)).

Count 9, aggravated oral copulation (§ 288a, subd. (c)(2)).

Count 10, second degree robbery (§§ 211, 212.5, subd. (c)).

Counts 1 through 7 pertained to victim 1 and were alleged to have occurred sometime between September 1, 2006 and January 10, 2007. Counts 8 through 10 pertained to victim 2 and allegedly occurred on December 21, 2006. The indictment carried multiple sentencing enhancements relating to defendant's use of a knife or a gun (§§ 12022, 12022.3, 12022.5, 12022.53, 667.61) and to his sexual assault of more than one victim in the case (§ 667.61, subds. (b) & (e)). The indictment also alleged one prior serious felony (§§ 667, subd. (a), 1192.7) and one prior strike (§§ 667, subds. (b)-(i), 1170.12). Both prior conviction allegations related to defendant's 2002 conviction of aggravated assault (§ 245, subd. (a)(1)), for which defendant was sentenced on August 20, 2003, to three years in prison.

E. Trial

Trial began October 23, 2008. Victims 1 and 2 and the investigating officers testified to the facts set forth above. In addition, the prosecution introduced evidence of three uncharged offenses. Defendant did not testify. The defense case focused upon the credibility of the victims and the lack-of-consent element needed to prove the sex crimes.

1. M. Doe

On one of the computers found in defendant's apartment there was a video clip labeled with M. Doe's name. The video, which had been shot inside defendant's apartment, shows an unclad M. Doe touching her genitalia and, in another scene, the fingers of another person, someone who appeared to be an African American male, were penetrating M. Doe's vagina. (Defendant is African American.) There was no dispute that, as defense counsel noted after the video was played to the court, M. Doe looked "unhappy with what is occurring in that moment."

M. Doe did not testify; she had died before trial commenced. Consequently, all the evidence relating to her came in by way of the people who saw her and examined her in January 2007. Officer Michael Cristol testified that, on January 9, 2007, he was dispatched to a gas station not far from defendant's apartment. When he arrived, he

observed M. Doe in a car, crying, holding her arms in close, and "seemed to be very troubled." He took her to Valley Medical Center where she underwent an examination for sexual assault conducted by registered nurse, Kathleen Stallworth. Ms. Stallworth observed a quarter-inch jagged edged laceration of the posterior forchette, an area of the vaginal opening. The injury could have come from consensual or nonconsensual intercourse. Such injuries are more likely to occur when intercourse is nonconsensual. The injury could also have come from the digital penetration depicted in the video recovered from defendant's apartment.

Biological evidence revealed a mixture of DNA in a swab taken from M. Doe's toe, which included DNA possibly contributed by defendant. The used condom collected from defendant's apartment contained DNA from defendant and from M. Doe. M. Doe's DNA was also found in a sample taken from defendant's penis on January 10, 2007, the day after M. Doe was examined at the hospital.

2. L. Doe

In 1998, L. Doe was 15 years old and defendant, who was her former boyfriend, was 16. One day, L. Doe saw defendant walking with another girl. L. Doe confronted defendant about the girl and, after chatting about that, defendant picked up L. Doe in a "bear hug" and carried her behind a parked van. He laughed, stood with one foot on L. Doe's feet, and with one hand held her hands above her head. L. Doe resisted and moved her face back and forth to avoid defendant's attempts to kiss her. He then pulled her pants and underwear down to her knees, unfastened his own pants, and pulled out his penis. L. Doe fought and told him to stop. He laughed and let her go. L. Doe told her mother what had happened and her mother called the police. L. Doe reported the assault to the officer who responded to the call. Thereafter, L. Doe avoided defendant and had no further relations with him.

3. K. Doe

In 2000, 15-year-old K. Doe had consensual sex with defendant at his house. Afterward, a third person entered the house and defendant told K. Doe to have sex with that person, too, but K. Doe refused, whereupon defendant became aggressive, "almost like a different person." He told her he wanted oral sex and when she refused he grabbed her head and forced it onto his penis then forced her neck up and down. He also slapped her. She was scared. He took her outdoors, ordered her to keep her shirt open, and threatened to hit her if she buttoned it. A police officer observed defendant holding K. Doe in an "aggressive" manner. K. Doe's eyes were red and swollen, she looked afraid, and, except for a couple of buttons, her shirt was open down the front.

F. The Verdict and Sentence

The jury found defendant guilty on all counts and found true all associated allegations except the firearm enhancements. The prior conviction allegation was tried to the court, which found that defendant had been convicted of assault with a deadly weapon, a strike offense. The court denied defendant's motion for new trial and refused to strike the prior conviction finding. The court sentenced defendant to a total determinate term of 74 years and eight months for all counts except counts 2 and 9 (§ 288a, subd. (c)(2), oral copulation by force). As to counts 2 and 9, the court sentenced defendant to a combined indeterminate term of 90 years to life, for a total of 164 years and eight months to life.

III. DISCUSSION

A. Evidence of Uncharged Offenses

Defendant maintains that the trial court erred in admitting evidence of the three uncharged offenses. We detect no error.

As to the conduct described by L. Doe, the court found that the evidence "falls within Evidence Code section 1108. [¶] I'm also going [to] find its probative value outweighs any prejudicial effect, consumption of time and confusion of issues." As to K.

Doe, the court held a hearing pursuant to Evidence Code section 402 and concluded that evidence of the K. Doe incident was also admissible pursuant to Evidence Code section 1108.

The trial court viewed the video of M. Doe and heard the prosecutor's offer of proof with respect to the January 2007 incident. The court ruled, "It seems to the court the signal under [Evidence Code section] 1108 is whether or not the person involved was the victim of a nonconsensual sex act, and if so, whether the defendant was the perpetrator. We've talked about lots of different proof of this incident. It appears that there's not--if there was a nonconsensual sex act, that the defendant was in fact the person involved in it. The real issue is whether or not it was consensual." The court found, based upon the offer of proof "with respect to the SART [Sexual Assault Response Team] nurse as well as the other circumstances that this is a case that falls within the authority of Evidence Code section 1108, that there is sufficient evidence to show that there was a nonconsensual sex act and that the defendant was the perpetrator." The court went on to find that the evidence was not unduly prejudicial and allowed the evidence "to be heard for 1108 purposes."

Under specified circumstances, Evidence Code section 1108 allows propensity evidence to be admitted in sex offense cases. Evidence of propensity--evidence of a person's character or character trait--is generally inadmissible when offered to prove the person's conduct on a particular occasion. (Evid. Code, § 1101, subd. (a).) But Evidence Code section 1108, subdivision (a) provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." This section " 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing

process required by [Evidence Code] section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

Defendant first maintains that Evidence Code section 1108 violates the due process clause of the federal Constitution. But *People v. Falsetta* (1999) 21 Cal.4th 903, 917, held that Evidence Code section 1108 did not offend due process principles. We are bound by our Supreme Court's resolution of that issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant recognizes that we must follow *Falsetta*, but argues that *Falsetta*'s holding turned upon the fact that Evidence Code section 1108 requires the trial court to apply an Evidence Code section 352 analysis before permitting the introduction of propensity evidence. According to defendant, the evidence in question failed the requirements of both Evidence Code sections 1108 and 352. The Attorney General maintains the evidence showed defendant's propensity to commit forcible sexual offenses and that it satisfied the Evidence Code requirements.

To the extent defendant challenges the application of Evidence Code section 1108 to undisputed facts, he raises issues of law to which we apply the independent standard of review. (*People v. Griffin* (2004) 33 Cal.4th 536, 593 (*Griffin*).) Defendant's challenge to the admissibility of the prior uncharged act as a violation of Evidence Code section 352 is analyzed under an abuse of discretion standard. (*Griffin*, *supra*, at p. 577.)

1. Conduct Constituting a Sexual Offense

As to L. Doe, defendant maintains that the evidence did not support a finding that that he had committed a sexual offense against her. As Evidence Code section 1108 specifies, it is evidence of "another sexual offense," and not just any offense, that is admissible to show propensity in sex offense cases. But defendant did not raise this objection below. Indeed, his attorney described the incident as defendant's attempt "to have vaginal intercourse" with L. Doe. Defendant's only argument below was that the evidence was remote and dissimilar to the charged crimes so that it should have been excluded pursuant to Evidence Code section 352. In any event, the evidence is sufficient

to show that defendant assaulted L. Doe with the intent to rape her: He grabbed her, pulled her behind a van, held her arms and stood on her feet while she struggled to get away. He then pulled her pants and underwear down and pulled his penis out of his pants before she was finally able to free herself and run away.

Defendant argues that the jury was never informed what alleged crime he was supposed to have committed against L. Doe and may have thought the crime was merely indecent exposure. This is not so. When instructing the jury in the language of CALCRIM No. 1191, the trial court specified that the prosecution had "presented evidence that the defendant committed other crimes of assault with intent to commit rape, forced oral copulation and forced sexual penetration that weren't charged in this case." Furthermore, given the evidence of defendant holding L. Doe against her will and her struggling to get away while he pulled her pants down, no reasonable jury could have concluded that the conduct was nothing more than indecent exposure.

Defendant challenges the evidence pertaining to M. Doe on grounds it did not demonstrate any crime was committed. Defendant did raise this argument during the in limine proceedings, contending that the evidence did not establish that M. Doe's sexual contact with defendant was not consensual. We detect no abuse of discretion. There is no dispute that defendant had had a sexual encounter with M. Doe on or about January 9, 2007. As the trial court recognized, the issue was whether the encounter had been consensual. Evidence that there was no consent is purely circumstantial but sufficient. First there was the video, in which M. Doe is said to appear unhappy. It is true that there could have been many reasons why M. Doe appeared unhappy. But one such reason was that she was being forced to submit to the recording and to perform the acts depicted. That inference is supported by the fact that Officer Cristol responded to a call sometime after M. Doe's contact with defendant and found M. Doe visibly upset. Thereafter, M. Doe submitted to a sexual assault examination which revealed an injury to her vaginal opening consistent with her having had either consensual or nonconsensual intercourse.

All of this supports the inference that M. Doe did not consent to sexual conduct with defendant.

2. Subsequent Uncharged Offense

Defendant argues that the M. Doe evidence was inadmissible as a prior act because it was actually a subsequent act. We find no error. *People v. Medina* (2003) 114 Cal.App.4th 897 (*Medina*) held that acts of sexual molestation which occur after the charged offenses are admissible as propensity evidence under Evidence Code section 1108. (*Medina*, *supra*, at p. 903.) "The plain language of Evidence Code section 1108 does not limit evidence of uncharged sexual offenses to those committed *prior* to the charged offense. On the contrary, the statute broadly states that evidence of the 'defendant's commission of *another* sexual offense,' is not made inadmissible by the prohibition on the introduction of character evidence contained in Evidence Code section 1101. (Evid. Code, § 1108, subd. (a), italics added.) This language strongly suggests that evidence of an uncharged sexual offense committed after the charged offense is within the scope of section 1108." (*Id.* at p. 902.) Propensity is an inference drawn from the nature of the conduct, not from the sequence of the events. (*Id.* at pp. 903-904.) Indeed, evidence that a defendant committed an offense almost identical to the charged offense is particularly powerful propensity evidence when the uncharged offense was committed right around the time (whether before or after) the charged offense was committed.

Defendant maintains that *Medina* was wrongly decided because it did not consider the cases pertaining to gang crimes. The gang cases have no application here. *People v. Godinez* (1993) 17 Cal.App.4th 1363 (*Godinez*), the principal case upon which defendant relies, involved section 186.22. Section 186.22 punishes the active participation in a criminal street gang and provides additional punishment for crimes committed for the benefit of such a gang. (§ 186.22, subds. (a), (b).) The section defines criminal street gang as one that participates in a "pattern of criminal gang activity." (§ *Id.* subd. (f).) And a "pattern of criminal gang activity" is shown where the gang is involved in two or

more specified offenses within a three-year period. (*Id*. subd. (e).) The question in *Godinez* was whether the predicate crimes used to establish a pattern of gang activity could be crimes that were committed after the crime with which the defendant was charged. (*Godinez, supra*, at p. 1369.) *Godinez* concluded they could not. "We recognize that it is not likely that a defendant will consult the Penal Code before acting. Nevertheless, due process entitles defendant to fair warning that his conduct is within the proscription of a particular statute." (*Id.* at p. 1370.) Unless the gang had engaged in a pattern of criminal activity prior to the date of charged crime, a defendant could not have notice that his conduct would be subject to the punishment provided by section 186.22. Accordingly, *Godinez* construed section 186.22, subdivision (e) to exclude offenses occurring after the offense for which a defendant is on trial. (*Godinez, supra*, at p. 1370.)

The notice consideration compelling the result in *Godinez* is not present here. The evidence was admitted to show defendant's propensity to commit the charged crimes, not as proof of a crime or enhancement with which he was charged in the instant case. Consequently, the due process analysis applied in *Godinez* is inapplicable. We think *Medina, supra*, 114 Cal.App.4th 897 was correctly decided and adopt its reasoning here.

3. Hearsay

Defendant argues that the evidence of the uncharged offense against M. Doe was inadmissible as implied hearsay. Defendant misapplies the concept. The evidence was circumstantial evidence; it was not hearsay.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is generally inadmissible. (*Id.* subd. (b).) A hearsay statement offered to prove the truth of that which is implied by the statement is also hearsay. (*People v. Pic'l* (1981) 114 Cal.App.3d 824, 885 (*Pic'l*), disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498.) Such evidence is treated as any other hearsay evidence. (*Pic'l, supra*, at p. 885.)

Here, the evidence of which defendant complains was not hearsay. It was the in-court testimony of Officer Cristol, who stated that he saw M. Doe crying and upset and that he took her to the hospital where she underwent a sexual assault examination, and the in-court testimony of Ms. Stallworth, who stated that she examined M. Doe and found a tear at her vaginal opening. There is no implied hearsay because no hearsay statements were admitted. Cristol and Stallworth each testified only to what they saw and what they did in response. The statements were offered for the truth of those observations and actions. The implication defendant challenges is the inference the prosecution wanted the jury to draw from the nonhearsay testimony of these two witnesses, i.e., that M. Doe had been sexually assaulted. An inference drawn from the nonhearsay, in-court testimony of a witness is not hearsay.

Defendant argues that one inference the jury may have drawn from the evidence was that M. Doe *reported* to the police officer that she had been sexually assaulted and that statement was hearsay and inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36. We agree with the Attorney General that, even if such a statement were admitted, it would have been admissible for the nonhearsay purpose of establishing that M. Doe reported the assault. (*People v. Brown* (1994) 8 Cal.4th 746, 750.)

4. Probative Value

Defendant's remaining argument is that the probative value of the evidence of uncharged offenses did not outweigh its prejudicial effect. Evidence Code section 352 provides that the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The defense theory was that defendant thought his victims had consented to the sexual acts he was accused of committing. Thus, the veracity of the victims' testimony was pivotal. Defendant attacked their recollections and their credibility by focusing upon

discrepancies in prior statements, their prior arrests, and their work as prostitutes. Evidence of the uncharged sexual assaults against L. Doe and K. Doe showed that defendant had been sexually abusive with young women who were not prostitutes much as he had been with victims 1 and 2. The evidence tended to support the testimony of victims 1 and 2 that defendant had forced them to perform the acts they described and that he knew they did not consent to those acts. The evidence pertaining to M. Doe was particularly probative because it supported a finding defendant had sexually assaulted another prostitute within weeks or months of the sexual assaults that victims 1 and 2 described. Accordingly, the evidence was highly probative because it tended to reinforce the credibility of the victims' accounts. (See *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1275.)

5. Prejudice

"Against the appreciable probative value of the evidence we balance its prejudicial effect upon the defense. 'In general, "the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." ' (*People v. Daniels* (2009) 176 Cal.App.4th 304, 316.)" (*People v. Hollie, supra,* 180 Cal.App.4th at p. 1276.) Undue prejudice, within the meaning of Evidence Code section 352, is not simply damage to the defense case, which naturally flows from relevant, highly probative evidence. Evidence is unduly prejudicial if it causes the jury to make a finding of guilt on the basis of extraneous factors. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Defendant argues that the offenses against K. Doe and L. Doe should have been excluded because they occurred eight and six years prior to the charged offenses. While remoteness is a consideration, there is no bright-line rule. (*People v. Harris, supra,* 60 Cal.App.4th at p. 737.) A gap of six or eight years is not so long that it would necessarily

take the jury's collective eye off the matter at hand. The assault of M. Doe occurred just weeks or months after the assault upon the two complaining victims, which tends to show that the propensity defendant exhibited in 1998 and 2000 had not abated in the years since then. Furthermore, his opportunity to commit other similar acts in the six to eight intervening years was limited by the time he served in prison beginning in 2003.

Citing *People v. Abilez* (2007) 41 Cal.4th 472 (*Abilez*), defendant argues that as to both L. Doe and K. Doe, the evidence was not particularly probative because the conduct occurred when he was a juvenile. *Abilez* does not stand for the proposition asserted. In *Abilez*, the trial court had refused to admit evidence pertaining to a codefendant's juvenile adjudication for attempted unlawful intercourse with a minor. The defendant offered the evidence to show that the codefendant was the one who committed the crimes with which the defendant was charged. (*Id.* at pp. 498-499.) The high court decided there was no abuse of discretion in excluding the evidence because, since the crime was so remote (20 years in the past), was the only sex-related conviction, and was so different from the crime at issue (sodomy and murder of a 68-year-old woman), the probative value of the evidence was "weak." (*Id.* at p. 501.)

Here, defendant's conduct as a juvenile was not 20 years in the past but only six to eight years prior. And the conduct was very much like the conduct alleged in this case, which included his use of force or the threat of force against women in connection with sexual acts. The K. Doe incident bears the additional similar features of defendant's changing demeanor, one minute nice, the next, aggressive and mean, and his forcing the victim to orally copulate him. Defendant maintains that the conduct he displayed with L. Doe was not similar to the conduct with which he was charged here, but we disagree. Although it was much milder than what victims 1 and 2 described, defendant's conduct with L. Doe--holding her against her will and behaving in a sexually aggressive manner--is the same thing he did here only much more viciously.

Again citing *Abilez*, defendant argues that as to all three prior incidents, since there was no criminal prosecution, the evidence was not sufficiently probative to be admissible under Evidence Code section 352. Again, *Abilez* does nothing to advance the point. *Abilez* stands only for the fact that a trial court does not abuse its discretion in excluding prior crimes evidence where the probative value of the evidence is weak. (*Abilez, supra*, 41 Cal.4th at p. 501.) Here, the question is whether the trial court abused its discretion in concluding that the probative value of the evidence was not outweighed by the risk of undue prejudice. The fact that defendant was not convicted of the uncharged offenses does not wholly undermine their probative value. The absence of a conviction means only that the prosecution could not or did not attempt to meet the beyond a reasonable doubt standard of proof in connection with the prior offense. But in proving a prior sexual offense as propensity evidence, "the prosecution is required to prove each element of the prior crime utilizing the more lenient preponderance of the evidence standard." (*People v. Lopez* (2007) 156 Cal.App.4th 1291, 1299.) Thus, although a defendant may avoid prosecution or conviction of a prior sexual offense because of the stringent burden of proof, because Evidence Code section 1108 imposes a more lenient burden, evidence of a prior offense may be admissible for propensity purposes even if the defendant was not convicted of a sexual offense or, indeed, of any crime at all. As defendant maintains, the absence of a conviction goes to the probative value of the evidence. It does not make it inadmissible. And here, since the conduct in all three prior cases was sufficiently similar to the conduct with which defendant was charged, the trial court acted within its discretion in concluding that the probative value was substantial, notwithstanding the absence of a conviction. In sum, we conclude that the trial court did not abuse its discretion in allowing the prosecution to introduce evidence of the three uncharged offenses.

B. CALCRIM No. 1191

The trial court instructed the jury in the language of CALCRIM No. 1191, as follows: "[T]he People presented evidence that the defendant committed other crimes of assault with intent to commit rape, forced oral copulation and forced sexual penetration that weren't charged in this case. [¶] These crimes are defined for you in the earlier instructions. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses you may, but are not required to conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude that the defendant was likely to commit and did commit the offenses charged in counts two through six and nine in this case. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the offenses charged in counts two through six and nine. [¶] The People must still prove each charge and allegation beyond a reasonable doubt."

Defendant contends this instruction was improper because, by inviting the jury to find the uncharged offenses by a preponderance of the evidence (rather than beyond a reasonable doubt), it conflicted with the reasonable doubt instructions and could have allowed the jury to convict defendant of the charged crimes based upon the lesser standard of proof or based solely upon finding that defendant had committed the uncharged crimes. *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 (*Reliford*), rejected the same arguments in connection with the 1999 version of CALJIC No. 2.50.01,

which was substantially similar to CALCRIM No. 1191.[2] *Reliford* held, "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense . . . . The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] Any other reading would have rendered the reference to reasonable doubt a nullity." (*Reliford, supra,* at p. 1016.)

Reliford also held that the instruction did not allow the jury to rest a conviction solely on evidence of the uncharged offenses. To the contrary, the instruction specifically provided that if the jury found by a preponderance of the evidence that the defendant committed the uncharged offense, " 'that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.' " (*Reliford, supra,* 29 Cal.4th at p. 1013.) These instructions, the court concluded, "could not have been interpreted to authorize a guilty verdict based solely on proof of uncharged conduct." (*Ibid.*)

Relying upon *Reliford*, *People v. Cromp* (2007) 153 Cal.App.4th 476 (*Cromp*), rejected a due process challenge to CALCRIM No. 1191. Although CALCRIM No. 1191

[2] The version of CALJIC No. 2.50.01 considered in *Reliford* instructed the jury: " 'If you find that the defendant committed a prior sexual offense . . . , you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime. The weight and significance of the evidence, if any, are for you to decide. [¶] You must not consider this evidence for any other purpose.' " (*Reliford*, *supra*, 29 Cal.4th at p. 1012.)

is written in plainer language, *Cromp* held that it was substantially identical to CALJIC No. 2.50.01: "[T]here is no material difference in the manner in which each of the instructions allows the jury to conclude from the prior conduct evidence that the defendant was disposed to commit sexual offenses and, therefore, likely committed the current offenses. CALCRIM No. 1191, as given here, cautions the jury that it is not required to draw these conclusions and, in any event, such a conclusion is insufficient, alone, to support a conviction. Based on *Reliford*, we therefore reject defendant's contention that the instruction violated his due process rights." (*Cromp*, *supra*, at p. 480.)

Defendant relies upon *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 (*Gibson*), which held that the 1996 version of CALJIC No. 2.50.01 was unconstitutional. *Gibson* is distinguishable because the 1996 version of CALJIC No. 2.50.01 did not include the explicit admonition that the evidence of a prior sexual offense is not, by itself, sufficient to convict the defendant of the charged crimes. (See *Gibson*, *supra*, at pp. 817-819.) The 1999 version approved by *Reliford*, *supra*, 29 Cal.4th 1007, and the version of CALCRIM No. 1191 given here, both include that admonition. Since the instruction given here is substantially identical to that given in *Reliford*, we are bound to adhere to the Supreme Court's conclusion and reject defendant's constitutional challenge to CALCRIM No. 1191. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450, 455.)

C. Instruction on Prostitution

Defendant asked the trial court to instruct the jury with the following special instruction: "Prostitution is the agreement to engage or engaging in sexual or lewd acts in exchange for money or other compensation. [¶] A lewd act means touching the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification of either person." The trial court rejected the instruction, finding it argumentative and duplicative of the instructions it had approved. Defendant maintains this was error because

defendant's consent defense was based upon the fact that the victims were both prostitutes who were "prepared to consent" when they entered defendant's apartment. Defendant maintains that the proposed instruction was necessary in order to spell out this aspect of his consent defense to the jury. We disagree.

"A trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] In addition, "a defendant has a right to an instruction that pinpoints the theory of the defense. . . ." ' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.' " (*People v. Burney* (2009) 47 Cal.4th 203, 246.) On review of a claim of instructional error, we review the instruction de novo (*People v. Guiuan* (1998) 18 Cal.4th 558, 569) in light of the court's entire charge to the jurors (*People v. Crandell* (1988) 46 Cal.3d 833, 847).

Here, the main issue was whether defendant actually and reasonably believed the victims consented to the sex acts. With respect to the charges of oral copulation by force, the trial court instructed the jury, in pertinent part, "The defendant is charged in counts two and nine with oral copulation by force in violation of Penal Code section 288a. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant committed an act of oral copulation with someone else; [¶] Two, the other person did not consent to the act; [¶] . . . [¶] In order to consent, a person must act freely and voluntarily and know the nature of the act." The instructions went on to explain: "The defendant is not guilty of forcible oral copulation if he or she actually and reasonably believes the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented."

With respect to the charges of assault with intent to commit rape, the court instructed the jury that in order to prove the crimes, the People had to prove that the woman did not "act freely and voluntarily and know the nature of the act" and that "A woman who initially consents to an act of intercourse may change her mind during the act. If she does, under the law the act of intercourse is then committed without her consent if: [¶] One, she communicated to the man that she objected to the act of intercourse and attempted to stop the act. [¶] Two, she communicated her objections through words or acts that a reasonable person would have understood as showing her lack of consent. [¶] And three, the man forcibly continued the act of intercourse despite her objection." The trial court gave the same instruction on actual and reasonable belief in consent it gave in connection with the forcible oral copulation offenses.

Finally, in instructing the jury on the offenses of sexual penetration by force and kidnapping, the court again told the jury that the People had to prove beyond a reasonable doubt that the person "did not consent," that consent means the person acted "freely and voluntarily," and that defendant was not guilty if he "actually and reasonably believed" the other person consented.

The foregoing amply informed the jury of the requirement that the prosecution prove beyond a reasonable doubt that the victims did not consent and that defendant did not actually and reasonably believe they had consented. The fact that the victims were prostitutes who may have initially intended to consent was evidence defendant was entitled to, and did, argue in support of his defense theory. But a definition of prostitution as the agreement to engage in sex for money was merely argumentative; the trial court did not err in refusing it.

D. Sufficiency of the Evidence to Support the Prior Strike

The indictment alleged that defendant had suffered a prior conviction that qualified as a prior serious felony (§ 667, subd. (a)) and as a strike offense (§§ 667, subds. (b)-(i), 1170.12). Under section 667, subdivision (a), if a defendant has previously

been convicted of a "serious felony," the defendant shall receive a five-year enhancement for each such prior conviction. Under the Three Strikes law, one prior conviction of a serious or violent felony means, among other things, that the term for the current crime must be doubled. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1).) In both cases, a "serious felony" is as defined by section 1192.7, subdivision (c).

The prior conviction alleged in the indictment was described as "Assault with a Deadly Weapon, Penal Code Section 245 [subdivision] (a)(1) . . . ." Section 245, subdivision (a)(1), makes it a crime to commit an assault with a dangerous or deadly weapon *or* with force likely to result in great bodily injury. Under section 1192.7, only the former type of assault, assault with a dangerous or deadly weapon, is a serious felony. (§ 1192.7, subd. (c)(23).) Defendant argues that the evidence is insufficient to support the trial court's finding that his prior conviction was for assault with a dangerous or deadly weapon. We apply the substantial evidence standard of review. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

The trial court relied upon the certified record of a 2002 conviction from Sacramento County. That record included a two-count felony complaint. Count 1 alleged that defendant had committed corporal injury upon a person who was the parent of his child "under circumstances involving domestic violence, within the meaning of Penal Code section 12022.7 [subdivision] (e)." Count 2 alleged that defendant had committed "a violation of Section 245 [subdivision] (a)(1) of the Penal Code of the State of California, in that said defendant did willfully and unlawfully commit an assault upon [the victim] with a deadly weapon, to wit, a ceramic object, and by means of force likely to produce great bodily injury. [¶] NOTICE: The above offense is a serious felony within the meaning of Penal Code section 1192.7 [subdivision] (c)(23)."

The evidence also included the Sacramento court's minutes, which reveal that on October 9, 2002, defendant pleaded no contest to "Ct 2 PC 245(a)(1)" with a "stip" that the prosecutor would seek dismissal of "Ct 1 + alleg" and that defendant would be

sentenced to the midterm of three years in prison. The same document reveals that the trial court dismissed "Ct 1 + enhancing allegation." The minutes from August 20, 2003, show that the trial court denied probation and sentenced defendant to prison for three years. The abstract of judgment shows defendant having been convicted by plea of "assault w/deadly weapon w/likelihood of GBH [*sic*]."

On this evidence, the trial court found the allegation that defendant had been previously convicted of "assault with a deadly weapon" to be true. Defendant argues that this was error because the documents do not disclose whether his 2002 conviction was for assault with a deadly weapon or assault by means of force likely to cause great bodily injury. The Attorney General argues that defendant's plea of no contest to count 2 of the 2002 information admits all the facts alleged therein.

It is true that by pleading guilty, a defendant "admits every element of the offense charged [citation], all allegations, and factors comprising the charge contained in the pleading." (*People v. Tuggle* (1991) 232 Cal.App.3d 147, 154 (*Tuggle*), overruled on another ground in *People v. Jenkins* (1995) 10 Cal.4th 234, 252.) "[W]here a defendant enters a guilty plea constituting his voluntary admission he committed the acts alleged in the indictment, such plea unequivocally establishes the particular elements alleged *were both raised and resolved.*" (*People v. Hayes* (1992) 6 Cal.App.4th 616, 623; accord, *People v. Davis* (1996) 42 Cal.App.4th 806, 814.) Thus, in *Tuggle*, where a defendant pleaded guilty to a robbery alleged in the information to have been committed "by force *and* fear," the court of appeal concluded that the admission resolved the question of which version of the crime the defendant had committed; by pleading guilty to the allegation, which was stated in the conjunctive, the defendant had admitted that the crime involved both force and fear, even though under the operative statute the defendant could have committed robbery by either means. (*Tuggle*, *supra*, at pp. 153-154 & fn. 9.)

Tuggle differs from the present case in that the evidence included a transcript of the change of plea hearing at which the defendant "pled guilty to the offense of 'violating

section 211 of the California Penal Code, a felony, *as set forth in Count 1 of the information.*' By pleading guilty as charged, appellant necessarily admitted the force allegation and cannot now escape the consequences of that admission." (*Tuggle, supra,* 232 Cal.App.3d at p. 154.) Here, we have no record of what was said at the change of plea hearing.

In deciding whether the prior conviction constituted a serious felony, we look to the entire record of a prior conviction to determine its nature. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.) But here, aside from the information, all we have are the very cryptic minute orders and the abstract of judgment. One minute order shows defendant pleaded no contest to "Ct 2 PC 245(a)(1)" and does not specify that the plea was to the count *as alleged* in the information. In fact, the plea was given in exchange for the promise that "Ct 1 + alleg" would be dismissed. As defendant maintains, this notation, and the notation that the trial court dismissed "Ct 1 + enhancing allegation" in the interests of justice "in view of plea," is ambiguous and raises some doubt that defendant pleaded to count 2 specifically as alleged. A court is not limited to accepting a guilty or no contest plea only to the offense charged but can accept a guilty plea to any reasonably related lesser offense. (*People v. West* (1970) 3 Cal.3d 595, 612-613.) The abstract of judgment does not clarify anything because all it says is that defendant was convicted of "assault w/deadly weapon w/likelihood of GBH [*sic*]," a shorthand notation of the crime that may or may not mean that defendant had admitted the crime as alleged in the information.

When the record is ambiguous, the court must treat the conviction as reflecting "least adjudicated elements of the crime." (*People v. Rodriguez* (1998) 17 Cal.4th 253, 261.) We conclude that since there was a negotiated plea bargain, no record of what was actually said at the hearing, and ambiguous shorthand notations in the minute orders and the abstract of judgment, the record is inadequate to prove that defendant admitted both prongs of the section 245, subdivision (a)(1) allegation. (Compare *People v. Harrell*

(1989) 207 Cal.App.3d 1439, 1444 [prior information alleged residential burglary; defendant pled no contest to burglary " 'as charged in the Information' "]; *People v. Batista* (1988) 201 Cal.App.3d 1288, 1293-1294 [prior information alleged residential burglary; at plea hearing, defendant said he understood and admitted the charges].) Consequently, defendant was improperly sentenced under section 667, subdivisions (a), and (b) through (i). Our conclusion does not preclude retrial, however. (*People v. Barragan* (2004) 32 Cal.4th 236, 243, 245.) Accordingly, we shall remand the matter for retrial of the prior conviction allegation at the election of the prosecutor.

E. Sentencing on Counts 3 and 5

Defendant next argues that the trial court incorrectly sentenced him to full consecutive terms on counts 3 and 5 (violation of section 220, subdivision (a), assault with intent to commit rape of victim 1). The Attorney General concedes the error.

The trial court sentenced defendant on counts 3 and 5 pursuant to section 667.6, subdivision (c), which requires the imposition of full consecutive terms for specified offenses, including assault to commit rape, "if the crimes involve the same victim on the same occasion." This provision was added by initiative effective November 8, 2006. (Initiative Measure (Prop. 83, § 11, approved Nov. 7, 2006, eff. Nov. 8, 2006).) The indictment alleged that defendant's crimes against victim 1 all occurred "on or about September 1, 2006 through January 10, 2007." The precise date of the crime was never established. The parties agree that there is no evidence to support a finding that defendant assaulted victim 1 after the effective date of the amendment so that the trial court should have applied the version that was in effect prior to that. Prior to November 8, 2006, section 667.6 provided for full consecutive terms for multiple convictions of assault to commit rape only if the defendant had a prior conviction of specified crimes. (See former § 667.6, subd. (c).) Defendant had none of the specified prior convictions, accordingly, sentencing should have been imposed pursuant to section 1170.1.

F. Cruel and Unusual Punishment

Defendant finally contends that a sentence of 164 years to life, the practical equivalent of life without the possibility of parole, is contrary to the spirit of the three strikes law and offends constitutional proscriptions against cruel and unusual punishment because it is grossly out of proportion to the severity of the crime. Because defendant's argument relates primarily to the nature of the crimes he committed, and does not turn upon the number of years to which he was sentenced, we reach the issue even though defendant could receive a different sentence on remand.

Since, arguably, California Constitution's prohibition against cruel or unusual punishment is broader than the United States Constitution's prohibition, we analyze defendant's contention under the California standard only. A punishment that satisfies this standard necessarily also satisfies the federal standard. (Cf. *People v. Anderson* (1972) 6 Cal.3d 628, 634, superseded by Cal. Const., art. I, § 27 on other grounds.) A punishment may violate article I, section 17 of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

Citing *Lynch*, *supra*, 8 Cal.3d at pages 425-429, the California Supreme Court has "identified three techniques used by the courts to focus the inquiry: (1) an examination of 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society'; (2) a comparison of the challenged penalty with those imposed in the same jurisdiction for more serious crimes; and (3) a comparison of the challenged penalty with those imposed for the same offense in different jurisdictions." (*In re Reed* (1983) 33 Cal.3d 914, 923, overruled on other grounds by *In re Alva* (2004) 33 Cal.4th 254, 260.) A penalty need not be disproportionate in all three areas to be cruel or unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38 (*Dillon*).) "[E]ven if factors 2 and 3 of the *Lynch* test favor a finding of disproportionality, we must examine

the nature of the offense and the offender and set aside the [penalty] only if it is 'so "disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." ' " (*People v. King* (1993) 16 Cal.App.4th 567, 574.) As to the first factor, courts must consider the "totality of the circumstances" surrounding the commission of the crime, including "such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Dillon*, *supra*, at p. 479.) Whether a punishment is unconstitutional in a particular case is a question of law subject to independent review on appeal. (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000.)

As to the nature of the offenses, defendant maintains that he is being punished for little more than having sex with prostitutes without paying them. The argument is remarkably callous. The crimes were violent crimes, committed in defendant's own apartment, after defendant had taken the victims' cell phones, depriving them of a means to call for help. He threatened them, slapped them, dragged them, and physically forced them to perform sex acts. There was no neglect in his failure to pay the victims. Rather, he took what little of value they had. Indeed, he took all of victim 2's money and all her worldly possessions. Defendant's abuse of his victims demonstrates his abject lack of respect for the lives and dignity of other human beings. We flatly reject the assertion, implicit in defendant's argument, that his crimes were somehow less egregious because his victims were prostitutes.

As to the nature of the offender, it is true that defendant has only one prior felony conviction. But he is quite young--26 years old at the time of trial. His demonstrated pattern of behavior makes him a significant risk to public safety. It is true that California, among all the states, treats sexual offenses especially harshly. But such treatment has previously withstood attack as unconstitutional. (See, e.g., *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 528-532 [129-year term for multiple sexual offenses constitutional despite lack of prior record and mental impairment].) Defendant offers us no basis for

concluding that his case is any different. We conclude, therefore, that under the circumstances of this case, a sentence of 164 years to life is not unconstitutionally cruel or unusual.

IV. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to allow the district attorney to retry the prior-conviction allegations contained in the indictment (Pen. Code, § 667, subds. (a) & (b)-(i).) If the district attorney does not elect to retry the allegations within 60 days of issuance of the remittitur, then the trial court shall enter a new judgment, resentencing defendant on counts 3 and 5 in accordance with the opinions expressed herein.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

McAdams, J.